No. 76-1491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

ANTHONY M. NATELLI,

Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

PHILIP A. LACOVARA
Hughes Hubbard & Reed
1660 L Street, N.W.
Washington, D.C. 20036

JOHN S. MARTEN, JR.
Martin, Obermaier & Morvillo
1290 Avenue of the Americas
New York, New York 10019

Attorneys for Petitioner

Washington, D.C. • [illegible] PUBLISHING • LAW PRINTING CO. • [illegible]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1491

ANTHONY M. NATELLI,

Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

In his petition, petitioner has urged that the court below committed reversible error when it (1) refused to consider whether at his trial the government had produced any evidence of an essential element of the offense of which he had been charged and convicted, the court below having concluded that this issue had been decided adversely to petitioner on direct appeal; and (2) relied upon its own assessment of the credibility of a witness when it affirmed a summary denial of petitioner's §2255 motion showing that critical factual assertions made to petitioner's jury by the prosecutor were contradicted by later testimony of a

government witness in another prosecution in a manner supporting petitioner's defense.

In its brief in opposition, the government accepts petitioner's statement of the law as presented in the petition, but asserts that the court below followed it. Notwithstanding the government's efforts to rehabilitate the decision below, the opinion of the court of appeals clearly demonstrates its failure to follow the statute and this Court's decisions.[1]

I.

THE COURT BELOW HELD THAT IT WAS BARRED FROM CONSIDERING THE GOVERNMENT'S FAILURE OF PROOF.

The government now concedes the principles established by *Sanders v. United States*, 373 U.S. 1 (1963), and later cases that the doctrine of res judicata is inapplicable to collateral review under §2255 and that a court may give "controlling weight" to a resolution on direct appeal only if the ends of justice will not be served by reaching the merits. 373 U.S. at 15. The government purports to find in the opinion below

[1] Several inaccuracies appear in the government's statement of the facts, but these are immaterial to an understanding at this stage of the essential errors committed by the court below. To note one of the more serious inaccuracies, the government states that when petitioner first learned that NSMC proposed to include in unaudited financials income attributed to the Pontiac commitment, petitioner "indicated that he *might* not permit" this income to be accrued without sufficient documentation of a firm contract. (Br. in Opp. 3, emphasis added.) In fact, as the transcript references cited show and as the government has conceded in its briefs to other courts, when petitioner first learned of NSMC's use of the Pontiac figures, he indicated unequivocally that the inclusion of the Pontiac figures in the financials *would not* be accepted by the accountants in the absence of documentation showing a firm commitment. (Tr. 653,672.)

adequate compliance with these principles. Even a cursory inspection of that opinion, however, demonstrates vividly that the court of appeals failed to follow the *Sanders* holding.

The court disposed of the failure of proof issue as follows: "once a matter has been decided adversely to a defendant on direct appeal it *cannot be relitigated* in a collateral attack under section 2255." (Pet. 3a, emphasis added.) The court specifically acknowledged petitioner's argument that "the rule barring a collateral attack on the disposition of issues previously litigated should yield in the interests of justice." (Pet. 3a.) But in the very next sentence of the opinion, the court of appeals stated that it recognized only one exception to an otherwise insurmountable barrier to consideration of the merits: a situation "where there was an intervening change of law after the initial decision was reached." (Pet. 3a.) But this Court's decision in *Sanders* and other cases cited in the petition (Pet. 17-18) do not permit a lower court to construct such a barrier to its consideration of issues on collateral review.

The district court also ruled adversely to petitioner on the failure of proof issue indicating that the issue had been litigated on direct appeal and then adding that "the argument has not gained merit in the ensuing months." (Pet. 4c.) The government finds in this latter statement by the district court a rejection of the issue on the merits and then asks this Court to make the logical leap of assuming that the court of appeals silently adopted that ground when it affirmed. But the court of appeals conspicuously refused even to acknowledge that aspect of the district judge's opinion, deeming it necessary only to cite his observation that the issue had been raised on direct appeal. (Pet. 3a.) So tortured is the government's argument in this Court that the court of appeals did not apply res judicata principles that we can only suggest a re-reading of the second paragraph of the opinion below, which surely dispels on its face the government's bare assertion that the court conformed to the teaching of *Sanders*.

The government also purports to find adherence to *Sanders* in the citation by the court below of two of its prior decisions: *United States v. Granello*, 403 F.2d 337, 338 (2d Cir. 1968), which states delphically that res judicata bars collateral review except in "extraordinary circumstances," a term not defined; and *Myers v. United States*, 446 F.2d 37, 38 (2d Cir. 1971), in which the court indicated skepticism that principles of res judicata should yield on collateral review *even* in the case of an intervening change of law. The government conveniently neglects to quote the supposed rule for which the court of appeals cited these two cases: "once a matter has been decided adversely to a defendant on direct appeal it cannot be relitigated in a collateral attack under section 2255." (Pet. 3a.) As noted in the petition (pp. 17-18), courts of appeals in other circuits have rejected this "rule" as inconsistent with *Sanders*. At a minimum, therefore, this Court should grant review and resolve the split in the lower courts. But, since the government concedes here that the "rule" applied by the court below is erroneous, (Br. in Opp. 6), this Court may go even further. Because there is no basis for doubting that the court below applied the rule it said it was applying, the government's concession amounts to a confession of error, and petitioner is entitled to summary reversal in this Court.[2]

[2]The government also seems to concede, as we argued in the petition (Pet. 19-20) that the absence of "any relevant evidence as to a critical element" may justify collateral relief, but classifies petitioner's claim as a mere "challenge to the sufficiency of the evidence." (Br. in Opp. 6-7 & n.2.) A reading of the petition, however, shows that petitioner's claim is that there was *no* relevant evidence that the Eastern contract was false. If there is any question about the availability of collateral relief for this kind of claim, plenary consideration by the Court is surely warranted.

II.

THE COURT BELOW DID NOT CONCLUDE (AND COULD NOT HAVE CONCLUDED) THAT THE STATUTORY REQUIREMENTS FOR SUMMARY DENIAL OF A §2255 MOTION WERE SATISFIED.

Section 2255 directs a court to hold a prompt hearing "unless the motion and the files and records of the case *conclusively show*" that the movant is not entitled to relief. (Emphasis added.) Petitioner's motion presented testimony by government witness Randell in a subsequent prosecution that materially contradicted a theme repeatedly purveyed by the prosecutor to the jury that convicted petitioner – that the Eastern commitment was a fake "hatched" at three o'clock in the morning of August 15, 1969. That theme was critical to the governnment's effort to establish that petitioner "must have known" that the inclusion of the Eastern commitment rendered the earnings statement false and misleading. By statute, petitioner was entitled to an evidentiary hearing on his §2255 motion to establish that the prosecutor at petitioner's trial either knew or should have known that his account of the Eastern commitment was materially false or misleading. Such a showing would have required reversal of petitioner's conviction under the principles of this Court's decisions in *Alcorta v. Texas*, 355 U.S. 28 (1957), and *Miller v. Pate*, 386 U.S. 1 (1967).

Nevertheless, the district court denied the motion summarily and the court of appeals affirmed, with neither court citing the critical statutory language or the decisions of this Court which have applied it, *e.g.*, *Fontaine v. United States*, 411 U.S. 213 (1973). Here, as with the first issue presented by petitioner, the government accepts petitioner's statement of the applicable legal standard but argues that the court below complied with that standard. The government thus asserts to this Court that the court of appeals "concluded that the files and records showed that petitioner was not entitled

to collateral relief." (Br. in Opp. 8.) The decision below contains no such conclusion, and indeed the court of appeals could not properly have reached it.

The court below disposed of the variance between the prosecutor's version and the later testimony of government witness Randell in another key sentence the government neglects to quote. Petitioner's claim, the court observed, "*assumes* . . . that Randell's testimony was accurate." (Pet. 5a, emphasis added.) Of course, petitioner assumed the accuracy of Randell's subsequent testimony in the court of appeals. The accuracy of that testimony was an issue to be resolved after an evidentiary hearing in the district court. Because the district court, however, had dismissed his motion summarily, the court of appeals was likewise obliged to "assume" the accuracy of Randell's subsequent testimony in reviewing that disposition, unless the files and records of the case conclusively showed that petitioner was not entitled to relief. But the files and records of this case do not provide any basis for summarily rejecting the credibility of Randell's testimony on this point. Randell did not testify at all in this case, and as far as we know the district judge has never seen him. The court of appeals similarly assumed away the credibility issue and denied relief upon *its* assumption that Randell's testimony had to be *in*accurate. The appellate court assumed that Randell's testimony was necessarily false because he was "an admitted swindler and briber who was a hostile witness in the subsequent proceedings." (Pet. 5a.)[3]

[3]Paradoxically, the court of appeals then went on to observe that *other* statements in Randell's testimony tended to support the government's assertion of the falsity of the Eastern commitment. The fact remains, however, that Randell's testimony is totally at variance with the account repeatedly purveyed to petitioner's jury – not just in closing argument as the government implies – that Eastern was "hatched" at three o'clock in the morning, an account which was of demonstrably critical significance on the essential element of petitioner's alleged *knowledge* of falsity of the NSMC earnings statement. If, as the court of appeals speculated, Randell's account might have assisted the government on the separate and independent element of actual falsity,

(continued)

As this Court has repeatedly held, and only recently reaffirmed in *Blackledge v. Allison*, No. 75-1693, decided May 2, 1977, the standards for summary denial of a §2255 motion are rigorous, and they do not permit an appellate court to indulge in an independent assessment of the credibility of testimony when there has been no opportunity for an adversary evidentiary hearing and evaluation by a trier of fact. Nor is an appellate court permitted to establish a conclusive presumption that the sworn testimony of one who has previously suffered a criminal conviction is false. Were this the law, most §2255 motions could be summarily denied. In this case, petitioner presented sworn testimony which, if accepted, shows that the prosecutor's account of the Eastern commitment was at the very least grossly misleading. If there were any controversy concerning the accuracy of that testimony, this, along with any other controverted issue,[4] was a matter for an evidentiary hearing in the district court.

(footnote continued from preceding page)

the possibility arises that the government deliberately held back his testimony, willing to forego its supposed contribution on the issue of actual falsity so that the prosecutor would be free to purvey a distorted account of the Eastern commitment in an effort to establish the separate and crucial element of knowledge. Petitioner does not argue, however, that the government was obliged to call Randell (who refused to be interviewed by the defense prior to trial) – only that the government was obliged to refrain from giving a distorted account of the Eastern commitment.

[4]Petitioner presented other facts bearing on the likelihood that the prosecutor knew at the time of petitioner's trial the facts to which Randell later testified: Randell had been interviewed by the prosecutor, had testified before the grand jury, and had pleaded guilty prior to petitioner's trial. In addition, petitioner brought to the attention of the court below Randell's recent deposition testimony in which he stated that he had discussed the background of the Eastern commitment with the prosecutor prior to petitioner's trial. (The deposition testimony appears in Appendix C to petitioner's brief to the court of appeals, copies of which are being lodged with the Clerk of the Court.) Any controverted issues concerning the knowledge of individual prosecutors were, of course, issues requiring an evidentiary hearing.

Had it been established after hearing that the government knew prior to trial that the true facts were at variance with the account later urged upon petitioner's jury, petitioner would clearly have been entitled to a reversal of his conviction. It is no answer to say, as the government does, that the prosecutor's remarks would still have been consistent with the proof at petitioner's trial (Br. in Opp. 9-10), for as in *Miller v. Pate, supra*, a misstatement by the government is not excused merely because the evidence has been structured to conform to it.

Perhaps the most critical issue before petitioner's jury was whether petitioner knew of alleged infirmities in the NSMC financials. The jury's judgment on that issue – reached only after two requests for supplementary instructions and an initial report of deadlock – was distorted by the government's repeated hammering at the theme that the Eastern commitment was supposedly "hatched" at three o'clock in the morning. Petitioner is entitled to an evidentiary hearing to determine whether the government knew that its account was distorted and, if so, to relief from the conviction which the distortion produced.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment below summarily reversed or the case set for oral argument.

Respectfully submitted,

PHILIP A. LACOVARA
Hughes Hubbard & Reed

JOHN S. MARTIN, JR.
Martin, Obermaier & Morvillo

Attorneys for Petitioner

July 14, 1977